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The Dormant Right to Plant-Based Food

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THE DORMANT RIGHT TO PLANT-BASED FOOD

James P. "Bud" Sheppard[*]

"It's a case of animal versus vegetable—and the *steaks* are high."[1]

I. INTRODUCTION

States that ban plant-based food options will harm the citizens they are presumed to protect. Nationally, twelve states, including Mississippi, adopted legislation restricting consumers' plant-based food options.[2] According to these state lawmakers, consumers cannot be trusted to differentiate between slaughtered meat and plant-based protein. Their solution? Restrict the advertising and sale of plant-based foods.

While plant-based alternatives to dairy have been under scrutiny for years, recent scientific developments enlarging plant-based meat options have instigated food labeling laws, intended to protect slaughtered meat sales, particularly among agriculturally dependent states.[3] Sustainability, health, and climate change concerns have fueled interest in plant-based

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1. Alina Selyukh, *What Gets to be a 'Burger'? States Restrict Labels on Plant-Based Meat*, ALABAMA PUBLIC RADIO (March 1, 2020, 8:50 PM), https://www.apr.org/post/what-gets-be-burger-states-restrict-labels-plant-based-meat.

2. Nathan A. Beaver et al., *What's in a Name? The Plant-Based Foods Labeling Debate*, FOLEY & LARDNER LLP (Dec. 31, 2019, 1:45 PM), https://www.foley.com/en/insights/publications/2019/10/whats-in-a-name-plant-based-foods-labeling-debate. ("Since the passage of the Missouri law, a number of other states have followed suit with similar legislation—Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, and Wyoming have all passed labeling laws restricting the use of the term meat.").

3. Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.L. REV. 29, 40-41 (2002).

food.[4] Given the current trends in diet, society, and environmentalism, plant-based food popularity has exploded beyond the local health store. In 2019, two of the largest national plant-based food brands, Impossible Foods, Inc. and Beyond Meat, Inc., added their plant-based burgers and sausages to thousands of restaurants, grocery stores, and fast food joints across the country.[5] With increased market share comes increased scrutiny.[6] This popularity translates into dollars and cents, and current industry proponents of the status quo view plant-based alternatives as a threat to their economic market share. Rather than embracing the potential for economic growth surfacing with the rise of food produced from genetically engineered plants, numerous agriculturally reliant states have passed laws to keep their competitors at bay and halt sales.

Due this issue's ripeness, this Comment will evaluate the constitutionality of state laws restricting access to plant-based food, while focusing on the Mississippi Food Labeling Law.[7] First, as explained in Part I of this Comment, the states that have effectively banned plant-based food options with food labeling laws should repeal the laws. Instead of barring access to plant-based foods, states should encourage informing consumers. Specifically, consumers should be made aware of the many health and environmental benefits a plant-based diet offers.

Part II of this Comment will provide a background of national and state authority that regulates the production and labeling of plant-based foods. Next, Part II will explore the applicability of federal preemption and the Dormant Commerce Clause. Following an in-depth evaluation of the Mississippi Food Labeling Law, Part III will argue that the states that have adopted food labeling laws targeted at limiting legal plant-based foods are preempted by federal law, and, alternatively, violate the Dormant Commerce Clause. Part IV will sum up the argument and conclude that the Mississippi Food Labeling Law, and similar state statutes, must be repealed. It shall be evident that to protect what should be a fundamental right, states should abolish the laws that attempt to restrict consumer's access to plant-based food options.

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4. Kelsey Piper, *Mississippi Will No Longer Ban Calling Veggie Burgers "Veggie Burgers",* VOX (Jan 1, 2020, 2:46 P.M.), https://www.vox.com/future-perfect/2019/9/6/20853246/mississippi-veggie-burger-ban-laws-plant-based.

5. Beaver, *supra* note 2.

6. *Id.*

7. MISS. CODE ANN. § 75-35-15 (2019).

II. BACKGROUND

A. National and State Authority to Regulate

The United States Food & Drug Administration (FDA) regulates the production, labeling, and safety of food produced from genetically engineered plants.[8] Under the Federal Food, Drug, & Cosmetic Act (FDCA), "all labeling must be truthful and not misleading."[9] State laws echo this requirement.[10] In recent years, twelve states have passed pointed laws targeting plant-based and cell-based protein.[11] These laws provide that only foods derived from food-producing animals may use labels like "meat," "sausage," "jerky," "burger," or other "meaty" terms.[12] This Comment will utilize the text of the Mississippi Food Labeling Law as a guidepost for the comparable state labeling laws emerging across the country.

1. The Mississippi Food Labeling Law

Prior to and during Mississippi's 2019 Legislative Session, influential slaughtered meat organizations[13] lobbied the Mississippi Legislature to make it more difficult for sellers of plant-based meat alternatives to compete in the meat retail industry.[14] Representatives from these groups publicly stated that the law "was necessary in order to protect

8. *Food from New Plant Varieties*, FDA (Jan. 1, 2020, 1:51 P.M.), https://www.fda.gov/food/food-ingredients-packaging/food-new-plant-varieties.

9. 21 U.S.C. § 343(a) (2019).

10. *See e.g.* MISS. CODE ANN. § 75-35-15(4) (2019) ("No item or product subject to this article shall be sold or offered for sale by any person, firm, or corporation, under any name or other marking or labeling which is false or misleading, or in any container of a misleading form or size, but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the commissioner, are permitted.").

11. Beaver, *supra* note 2 ("Cell-based meat is meat produced through animal cell culture technology and not from a slaughtered food-producing animal. These products are not yet available for commercial sale. The USDA will be taking the lead on the labeling of cell-based meat and, given USDA's statutory oversight, its stance on labeling is likely to have preemptive effect over state laws.").

12. *Id.*

13. The meat industry lobbying groups advocating in favor of Mississippi's food labeling law included the North American Meat Association, the Mississippi Cattlemen's Association, and the Mississippi Farm Bureau.

14. Complaint at 8, Upton's Naturals Co. v. Bryant, Case No. 3:19-CV-00462-HTW-LRA (S.D. Miss. July 1, 2019).

the meat industry from competition."[15] The lobbying organizations "did not want sellers of meat alternatives to reduce meat sellers' revenues the way sellers of almond milk and soymilk have reduced dairy revenues."[16] The lobbyists sought to achieve these protectionist goals by prohibiting plant-based food sellers through piecemeal state legislation.[17]

The Mississippi Food Labeling Law was passed as part of Senate Bill 2922 and took effect of July 1, 2019 after being signed into law by Governor Phil Bryant.[18] The Mississippi Food Labeling Law, once part of Mississippi Code Section 75-35-15, is a series of amendments and additions to Mississippi law purportedly enacted to provide consumers clear information on meat food products.[19] Among the law's most aggressive provisions is a restriction on plant-based foods. The pertinent section states that plant-based food products shall not be labeled as meat or a meat food product, even if the packaging clarifies the product is plant-based or 100% vegan.[20] Section 75-35-15(4) states that "[a] food product that contains cultured animal tissue produced from animal cell cultures outside of the organism from which it is derived shall not be labeled as meat or a meat food product."[21] Violation of the law can yield a punishment of fines or imprisonment.[22]

The Mississippi Food Labeling Law was immediately challenged in the United States District Court for the Southern District of Mississippi by

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15. *Id*. ("For example, Mississippi Farm Bureau President Mike McCormick publicly stated that the Ban "will protect our cattle farmers from having to compete with products not harvested from an animal.").

16. *Id*. at 9.

17. *Id*.

18. *Id*. at 10.

19. MISS. CODE ANN. § 75-35-15 (2019).

20. MISS. CODE ANN. § 75-35-15(4) (2019).

21. *Id.*

22. MISS. CODE ANN. § 75-35-311(1) (2019) ("Any person, firm, or corporation who violates any provision of this chapter for which no other criminal penalty is provided by this chapter shall upon conviction be subject to imprisonment for not more than one (1) year, or a fine of not more than one thousand dollars ($1,000.00), or both such imprisonment and fine; but if such violation involves intent to defraud, or any distribution or attempted distribution of an item or product that is adulterated (except as defined in Section 75-35-3(j)(8)), such person, firm, or corporation shall be subject to imprisonment for not more than three (3) years or a fine of not more than ten thousand dollars ($10,000.00) or both: provided, that no person, firm, or corporation shall be subject to penalties under this section for receiving for transportation any product or animal in violation of this chapter if such receipt was made in good faith, unless such person, firm, or corporation refuses to furnish on request of a representative of the commissioner the name and address of the person from whom he received such products or animal, and copies of all documents, if any there be, pertaining to the delivery of the products or animal to him.").

Upton Naturals, a national purveyor of plant-based foods.[23] Plaintiff Upton Naturals brought a "First Amendment challenge on behalf of sellers of clearly marked plant-based foods . . . to vindicate their First Amendment right to engage in non-misleading speech, so that they may use the labels that are best understood by their customers."[24] Upton Naturals revealed multiple flaws with the law.[25] For instance, if retailers redesigned their labels to comply with the Mississippi law, the process would not be complete in a timely manner, the resulting labels would be less clear to consumers' than current labels, and merchants would incur additional ongoing expenses by being forced to use different labels in Mississippi than in other states.[26]

In response to the litigation challenging the law, the Mississippi Department of Agriculture proposed new regulations to carry out the state's labeling law to "allow the use of meat and meat product terms on the labels of plant-based food under certain conditions."[27] The proposed regulations provide that "a plant-based food product will not be considered to be labeled as a 'meat' or 'meat food product' if one or more of the following terms, or a comparable qualifier, is prominently displayed on the front of the package: 'meat free,' 'meatless,' 'plant-based,' 'veggie-based,' 'made from plants,' 'vegetarian,' or 'vegan.'"[28] The proposed Mississippi regulations have not been adopted, and the law still stands. Notably, Mississippi is one of only two of the twelve states with these laws that have attempted to "balance" the law.[29] A more practical resolution for the state legislatures is to repeal the relevant amendments and additions altogether.

B. Federal Preemption

The federal government has arguably preempted the states from limiting food produced from genetically engineered plants; however, states will likely continue to move forward unless there is a binding court decision that these laws are preempted. Nevertheless, the state laws violate the Dormant Commerce Clause.

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23. Complaint at 1, Upton's Naturals Co. v. Bryant, Case No. 3:19-CV-00462-HTW-LRA (S.D. Miss. July 1, 2019).

24. *Id*. at 1-2.

25. *Id*. at 15-16.

26. *Id*.

27. *Labeling of Plant Based Foods*, MISSISSIPPI SECRETARY OF STATE (Dec. 31, 2019, 3:00 P.M.), https://www.sos.ms.gov/adminsearch/ACProposed/00024402b.pdf.

28. *Id.*

29. Beaver, *supra* note 2.

Preemption originates from the Supremacy Clause found in Article VI of the United States Constitution.[30] Preemption occurs when a state or local law conflicts with federal law.[31] If there is an inconsistency between federal and state or local law, federal law trumps and the state or local law must yield. There are two categories of preemption: express preemption and implied preemption.[32]

If Congress has the power to legislate, and by way of the federal statute, Congress explicitly states that federal law is exclusive in an area, then state and local laws are expressly preempted.[33] For instance, the Federal Meat Inspection Act[34] states that only the United States Department of Agriculture (USDA) can ascribe grades or labels for slaughtered meat.[35] Thus, any attempt by a state to regulate slaughtered meat labels will be deemed expressly preempted.[36]

Alternatively, the Supreme Court has found implied preemption in three circumstances where federal statute is silent.[37] First, state law is impliedly preempted if federal law and state law are mutually exclusive.[38] Thus, if it is impossible to abide by both the federal and state laws, the state law is invalidated.[39] Second, if the state law "impedes the achievement of a federal objective" (even if the federal statute is silent about preemption and also if there is no conflict), the state law will be struck down.[40] The third type of implied preemption holds that state law will be struck down if the court finds that Congress has evinced a desire that federal law is exclusive in that field.[41]

Although there is litigation spurring throughout the country in response to many of the state's updated food labeling laws, no court has ruled on federal preemption. The Good Faith Institute, a plaintiff in the legal challenge to the Missouri food labeling law, claimed the labeling of cell-cultured meat would invariably fall under the jurisdiction of the federal government.[42] The Federal Meat Inspection Act and the FDCA will likely

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30. U.S. CONST. art. VI ("The Constitution, and laws of the United States. . . shall be the supreme law of the land[.]").

31. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (6th ed., Aspen 2015).

32. *Id.*

33. *Id.*

34. 21 U.S.C. § 601 (2019).

35. CHEMERINSKY, *supra* note 31.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Elaine Watson, *Plant-Based and Cell-Cultured 'Meat' Labeling Under Attack in 25 States*, FOOD NAVIGATOR USA (Jan. 1, 2020, 5:32 P.M.),

return similar preemption findings regarding food labeling. In Part III, I will argue the Mississippi Food Labeling Law and similarly drafted statutes are expressly preempted under the FDCA, which explicitly requires all labeling to be truthful and not misleading. But even if the labeling of plant-based meat is not preempted by federal law, it nevertheless violates the Dormant Commerce Clause.

C. *The Dormant Commerce Clause*

The Dormant Commerce Clause (or Negative Commerce Clause) is "the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce."[43] Simply put, even though Congress has not acted, its commerce power lies dormant.[44] There is no constitutional provision explicitly authorizing the Dormant Commerce Clause.[45] But, the United States Supreme Court has inferred it from the grant of power to Congress to "regulate commerce . . . among the several states[.]"[46] Thus, even where Congress has not legislated in a specific area, the Supreme Court has expressed that state laws will be unconstitutional if it places too great of a burden on interstate commerce.[47] The political explanation for the Court's creation of the Dormant Commerce Clause is if one state is imposing a burden on other states, then the residents of those states cannot protect themselves through the political process.[48]

Justice Scalia and Justice Thomas pushed to eliminate the Dormant Commerce Clause and described it as a "judicial fraud" because it is not mentioned in the Constitution.[49] They further argued that if Congress wants to bar a state law that puts the burden on interstate commerce, Congress can do so.[50] But Justice Scalia and Justice Thomas remain alone among justices throughout history, as the Supreme Court has always followed the Dormant Commerce Clause.[51]

In analyzing whether a state law complies with the Dormant Commerce Clause, courts typically apply a two-step

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https://www.foodnavigator-usa.com/Article/2019/05/29/Plant-based-and-cell-cultured-meat-labeling-under-attack-in-25-states.

43. CHEMERINSKY, *supra* note 31.
44. *Id.*
45. U.S. CONST.
46. U.S. CONST. art. I, § 8, cl. 3.
47. CHEMERINSKY, *supra* note 31.
48. *Id.*
49. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1808 (2015).
50. *Id.*
51. CHEMERINSKY, *supra* note 31.

approach.[52] First, state law is subject to strict scrutiny if it clearly discriminates against interstate commerce by: (1) discriminating against interstate commerce on its face; (2) harboring a discriminatory purpose; or (3) discriminating in its effect.[53] The plaintiff bears the burden of establishing that state law has the discriminatory purpose or effect alleged.[54]

Next, courts apply a balancing test when a law is not discriminatory on its face but has an indirect effect on interstate commerce.[55] Under the balancing test, the law will be struck down only if the burden on interstate commerce outweighs its benefits from the law.[56]

In *Philadelphia v. New Jersey,* the state law at issue clearly discriminated against interstate commerce on its face.[57] New Jersey enacted a law[58] that prohibited out of state garbage from being dumped in New Jersey landfills.[59] The purpose may have sprouted from environmental concerns hoping to limit the amount of garbage coming into the state or economic reasons by restricting the amount of waste from outside the state.[60] Nonetheless, restricting the amount of garbage buried in New Jersey lowered the demand for landfill space.[61] Less demand would conceivably keep the price of landfill disposal down, which would then benefit New Jersey residents. But the Supreme Court found the New Jersey law unconstitutional.[62] The Supreme Court determined that New Jersey discriminated against commerce (garbage) from other states and placed an undue burden on interstate commerce.[63]

More recently, in *Granholm v. Heald*, Michigan imposed a law[64] that permitted in-state wineries to ship wine to purchasers through the mail, but barred wineries from outside the state of Michigan to ship wine to consumers through the mail.[65] The Supreme Court determined that the Michigan law was unconstitutional because it placed "a substantial burden

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52. George A. Kimbrell et al., *The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense*, 39 VT. L. REV. 341, 374 (2014).

53. *Id.*

54. *Id.*

55. CHEMERINSKY, *supra* note 31.

56. *Id.*

57. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

58. N.J. STAT. ANN. § 13:1I-10 (repealed 1981).

59. Philadelphia, 437 U.S. at 618.

60. *Id.* at 625.

61. *Id.* at 629.

62. *Id.*

63. *Id.*

64. MICH. COMP. LAWS ANN. § 436.1109 (West 2019).

65. MICH. COMP. LAWS ANN. § 436.1109 (West 2019).

on interstate commerce, it favored in-state companies over out-of-state companies," and it violated the Dormant Commerce Clause.[66]

The United States District Court for the District of Vermont heard a Dormant Commerce Clause claim in response to a food labeling law in *Grocery Manufacturers Association v. Sorrell*.[67] In *Sorrell*, the Vermont legislature adopted a statute requiring food sold in in the state that was produced entirely or in part from genetic engineering to carry a label stating "partially produced with genetic engineering;" "may be produced with genetic engineering"; or "produced with genetic engineering."[68] The legislature asserted that "labeling was necessary to prevent consumer deception, prevent potential risks to human health, protect religious practices, and protect the environment."[69] The Grocery Manufacturers Association, and other trade groups, sued Vermont contending the statute violated the Constitution under the Commerce Clause, Supremacy Clause, and First Amendment.[70] Plaintiffs claimed the mandatory labeling law created "an undue burden on interstate commerce, ultimately resulting in a 50-state patchwork of labeling laws."[71] The Vermont district court "dismissed the claim to the extent that labeling was unconstitutional under the Commerce Clause because no other states had conflicting labeling laws."[72]

"While this Comment focuses on the Dormant Commerce Clause challenge, *Sorrell* indicated a tendency for further increased litigation following the establishment of other individual state laws."[73] Moreover, the court's "ruling could easily change if even one other state passes a mandatory labeling law for genetically engineered foods inconsistent" with Vermont's statute.[74]

The potential ramifications of different state food labeling laws were illuminated in the United States Supreme Court case, *Hunt v.*

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66. *Id.* at 493.

67. Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015).

68. *Grocery Manufacturers Association v. Sorrell*, PUBLIC CITIZEN (Jan. 4, 2020, 1:46 PM), https://www.citizen.org/litigation/grocery-manufacturers-association-v-sorrell/.

69. *Id.*

70. Chelsea R. Crawford, *Don't Judge a Food by its Label: How a Mandatory Labeling Requirement for Genetically Engineered Foods Would Generate Confusion About Health and Food Safety and Create Economic Impacts For All*, 14 IND. HEALTH L. REV. 29, 63 (2017) (citing Grocery Mfrs. Ass'n v. Sorrell, 102 F.Supp. 3d 583 (D. Vt. 2015)).

71. *Id.*

72. *Id.* at 63.

73. *Id.* at 63.

74. *Id.* at 63.

Washington State Apple Advertising Commission.[75] In *Hunt*, North Carolina enacted a statute requiring all closed containers of apples shipped into the state to display the applicable USDA grade or none at all.[76] "Washington State, the United States' largest producer of apples, labeled all of its apples with its own state grade."[77] Due to Washington's strict inspection standards, its grades garnered broad acceptance and were considered equal or more superior to the USDA grades.[78] "Since Washington sent apples all over the country with these grades, the state had to change [its] shipping methods specifically for North Carolina alone, which was incredibly expensive (approximately $1 million each year)."[79] "Washington apple growers challenged the North Carolina statute as an unreasonable burden on interstate commerce" because the law forced Washington to prove their apples were better quality, which, Washington argued, was a discriminatory motive.[80]

"North Carolina claimed the USDA label was used so consumers could know [exactly] what they were getting, which is facially non-discriminatory."[81] "The Supreme Court held that although facially neutral, the North Carolina statute burdened interstate sales of Washington apples and was discriminatory."[82] "This statute raised the cost of doing business in Washington, while costs for North Carolina growers were unaffected."[83]

The Supreme Court announced that if a state or local government discriminates against out-of-staters and puts a burden on interstate commerce, the state's discriminatory action is allowed only if it is necessary to achieve a very important compelling government interest.[84] There is only one Supreme Court case that has upheld a discriminatory law in the face of a Dormant Commerce Clause challenge.[85] In *Maine v. Taylor*, Maine adopted a law prohibiting importing out-of-state baitfish into the state of Maine.[86] Legislators in Maine were concerned that the out-of-state fish might carry parasites that would endanger species indigenous to the state.[87] The Court upheld the law despite its discriminatory effect even

75. Crawford, *supra* note 70, at 63-64 (citing Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)).
76. *Id.* at 64.
77. *Id.* at 64.
78. *Id.*
79. *Id.* at 64.
80. *Id.* at 64.
81. *Id.* at 64.
82. *Id.* at 64.
83. *Id.* at 64.
84. CHEMERINSKY, *supra* note 31.
85. *See Maine v. Taylor*, 477 U.S. 131 (1986).
86. *Id.* at 132-33.
87. *Id.* at 133.

though it placed a burden on interstate commerce because Maine had an important interest in protecting its natural resources.[88] The Court determined the only way for Maine to protect its natural resources was to prohibit the importation of out-of-state baitfish.[89] The *Maine* Court addressed a nuanced concern. Generally, if the court concludes that a state law discriminates against out-of-staters, the law is likely unconstitutional and violates the Dormant Commerce Clause.[90]

On the other hand, if a state law places a burden on interstate commerce, but does not discriminate against out-of-staters, the Supreme Court is more permissive of state laws by using the *Pike v. Bruce Church, Inc.* balancing test.[91] In *Pike*, the Court held that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[92]

For instance, in *Bibb v. Navajo Freight Lines, Inc*., Illinois passed a law that required trucks to have curved mudguards.[93] Meanwhile, nearly every other state allowed straight mudguards.[94] The Illinois law was not discriminatory, as it applied to all trucks operating in the state.[95] Despite the non-discriminatory nature of the Illinois law, the Supreme Court determined the law was unconstitutional because it violated the Dormant Commerce Clause.[96] The Court said the Illinois law placed a substantial burden on interstate commerce.[97] Essentially, either trucks would be required to stop at the state border to change their mudguards, or avoid driving in the State of Illinois entirely.[98] The Court demonstrated there was no evidence that curved mudguards were safer than straight mudguards.[99] Therefore, since the burdens on interstate commerce outweighed the benefits, the law violated the Dormant Commerce Clause.[100]

In conclusion, even though Congress has not procured legislation specifically pertaining to the labeling of plant-based foods, the Supreme Court has said that state laws will be unconstitutional if the law puts too

88. *Id.*
89. *Id.*
90. *Id.* at 151-52.
91. *See* Pike v. Bruce Church, 397 U.S. 137 (1970).
92. *Id.* at 142 (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).
93. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 522 (1959).
94. *Id.*
95. *Id.*
96. *Id.* at 529.
97. *Id.*
98. *Id.* at 529-30.
99. *Id.* at 530.
100. *Id.*

great of a burden on interstate commerce. Thus, an evaluation of the Mississippi Food Labeling Law will substantiate that its heavy burden on interstate commerce supports a finding that it violates the Dormant Commerce Clause.

III. STATE-REQUIRED FOOD LABELING VIOLATES THE DORMANT COMMERCE CLAUSE

The federal government has expressly and impliedly preempted the states from limiting food produced from genetically engineered plants. Congress expressly preempted state food labeling laws with the FDCA, which requires all labeling to be truthful and not misleading. Additionally, these state laws impede the achievement of the federal government's objectives of consumer protection and encouraging a free market. Furthermore, precedent illustrates that state-mandated, plant-based food labeling laws violate the Dormant Commerce Clause.

A. Federal Law Preempts State Plant-Based Food Labeling Laws

The FDCA explicitly preempted state food labeling laws enacted to ban plant-based meat alternatives. The FDCA provides that all labeling must be truthful and not misleading. It does not seem feasible that the state food labeling laws will withstand judgment in their respective courts.

B. State Plant-Based Food Labeling Laws are Clearly Discriminatory

A state law restricting the labeling of plant-based food is clearly discriminatory facially, purposefully, and in effect. First, such laws are facially discriminatory because they discriminate between intrastate and interstate interests to favor the former over the latter. Second, the laws clearly discriminate in purpose because they promote in-state economic protectionism. Third, state labeling laws are discriminatory in effect due to the substantial burdens placed on interstate commerce.

The Mississippi Food Labeling Law is unconstitutional under a Dormant Commerce Clause analysis because it discriminates against commerce, namely plant-based foods, from other states, which bestows an undue burden on interstate commerce. The global sentiment reflects an overwhelming acceptance of plant-based diets as displayed by the skyrocketing stock of major plant-based food brands such as Beyond Meat, Inc. and Impossible Foods, Inc. Meanwhile, Mississippi has not yet embraced any in-state plant-based food production. Mississippi is home to many traditional animal farms and slaughterhouses. Currently, all plant-based foods in Mississippi are outsourced from other states and travel

through interstate commerce. Thus, barring the sale of plant-based food in Mississippi places an undue burden on interstate commerce.

Sorrell and *Hunt* illustrate how states' differing labeling requirements can cause food distributors' problems throughout the country.[101] "North Carolina claimed to be using the USDA label because consumers have the right to know" its apples' specific quality.[102] Likewise, Vermont claimed its "citizens have a right to know if genetic engineering was used in producing their food and should be labeled as such."[103] Similarly, Mississippi lawmakers maintain the food labeling law provides consumers clear information on meat food products. Therefore, like North Carolina and Vermont's statutes, the Mississippi Food Labeling Law has the potential to burden interstate sales of plant-based foods into Mississippi and raise manufacturers' costs of doing business in the state.[104]

While other states continue to pass mandatory food labeling laws, the problems that the Washington state growers underwent in *Hunt* will surface. Under the Mississippi Food Labeling Law, and related state statutes, manufacturers would have to change their packaging and distribution methods based on each individual state's labeling requirements, or they would be forced to stop shipping to those states altogether.[105] Thus, manufacturers and distributors face excessive costs associated with developing and printing different labels; farmers face reductions to their income, and consumers face increased prices at the supermarkets or are required to find other places to purchase certain foods.[106]

"*Sorrell* provided further verification that state-by-state mandatory labeling could cause increased litigation and potential for infringement o[f] Constitutional rights of individuals."[107] Mississippi plaintiffs have declared that if vendors redesigned their labels to comply with the Mississippi law, the process would not be complete promptly, the resulting labels would be less apparent to consumers' than current labels, and merchants would incur additional ongoing expenses by being forced to use different labels in Mississippi than in other states. Further, as more state mandatory labeling laws are passed, the potential for burdens on interstate commerce and Commerce Clause violations will continue to grow.[108]

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101. Crawford, *supra* note 70, at 65.
102. *Id.* at 65.
103. *Id.* at 65.
104. *Id.* at 65.
105. *Id.*
106. *Id.*
107. *Id.* at 65.
108. *Id.* at 65-66.

It is important to note that the Mississippi Food Labeling Law amendments pertaining to plant-based foods do not protect an important compelling government interest. The narrow exception illustrated in *Maine v. Taylor* upheld a discriminatory law only because it was necessary to protect the government's important interest in protecting its natural resources. Plant-based foods' sale and labeling will not negatively affect Mississippi's natural resources or any other important government interest. There is no evidence that plant-based foods are harmful to a person's diet or the environment. In fact, the contrary is true.

C. The Burdens of State Plant-Based Food Labeling Laws Far Exceed Any Speculative Benefits on Interstate Commerce

Even under the more permissive balancing test, the Mississippi Food Labeling Law's burdens on interstate commerce outweigh any benefits from the law. The law's burdens are great, while the benefits are obsolete. The reversal is true for the consumption of plant-based food: the burdens are obsolete, while the benefits are great.

Just like the affected trucks entering Illinois in *Bibb v. Navajo Freight Lines, Inc*. would have been forced to stop at the state border to change their mudguards or avoid driving in Illinois entirely; plant-based food retailers would have to completely rebrand their goods for sale in the state of Mississippi or avoid Mississippi entirely. The latter would create an immense burden on individuals who require non-animal protein due to health restrictions or personal choice.

A plant-based diet is better for individual health and the overall environment. There is nothing in an animal-based diet that you cannot get in a healthier form somewhere else.[109] But the strategy of the meat, dairy, and egg industry is to confuse the public and introduce doubt similar to the tactics of the tobacco industry.[110] When people adopt an entirely plant-based diet, their cholesterol levels plummet[111] and their blood pressure

109. Patrick J. Skerrett et al., *Essentials of Healthy Eating: A Guide*, NAT'L CTR. FOR BIOTECH. INFO. (Jan 6, 2020, 2:22 P.M.), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3471136.

110. *Smoking and Health Proposal*, TRUTH TOBACCO INDUS. DOCUMENTS (Jan 6, 2020, 2:40 P.M.), https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=psdw0147.

111. Fenglei Wang et al., *Effects of Vegetarian Diets on Blood Lipids: A Systematic Review and Meta-Analysis of Randomized Controlled Trials*, JOURNAL OF THE AM. HEART ASS'n, (Jan 6, 2020, 2:12 P.M.), https://www.ahajournals.org/doi/full/10.1161/jaha.115.002408.

lowers.[112] A coronary artery disease study showed that 99.4% of participants avoided major cardiac events by eating plant-based.[113] Moreover, if one consumes meat, the chances of getting diabetes are about 1 in 3.[114] Shockingly, any animal protein boosts the level of cancer-promoting growth hormone igf-1.[115]

States that intend to limit or ban plant-based options run the risk of harming the citizens they are trying to protect. If allowed, the labeling laws could negatively affect alternative milk options under the same confusion argument towards consumers. Autoimmune diseases are strongly correlated with dairy consumption.[116] Ironically, ad campaigns such as "Got Milk" from the dairy industry confuse consumers to believe that bovine milk is beneficial and "builds strong bones" when data reaches the opposite conclusion.[117] Countries with the highest levels of osteoporosis coincide with countries with the highest rates of dairy consumption.[118] Dairy consumption is linked to the growth of many types of cancer,[119] and

112. Alan Goldhamer, *High Blood Pressure*, T. COLLIN CAMPBELL CTR. FOR NUTRITION STUDIES (Jan 6, 2020, 2:14 P.M.), https://nutritionstudies.org/high-blood-pressure/.

113. Caldwell B. Esselstyln, Jr. et al., *A Way to Reverse CAD?*, THE JOURNAL OF FAMILY PRACTICE (Jan 6, 2020, 2:18 P.M.), http://dresselstyn.com/JFP_06307_Article1.pdf.

114. Qu Li et al., *Genetic Predisposition, Western Dietary Pattern, and the Risk of Type 2 Diabetes in Men*, NAT'L CTR. FOR BIOTECH. INFO. (Jan 6, 2020, 2:30 P.M.), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2676999/.

115. Michael Greger, *Protein Intake & IGF-1 Production*, NUTRITION FACTS (Jan 6, 2020, 2:48 P.M.), https://nutritionfacts.org/video/protein-intake-and-igf-1-production/.

116. *Focus of Plant-Based Foods to Ease Arthritis Pain*, PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE (Jan 26, 2020, 10:30 P.M.), https://www.pcrm.org/health-topics/arthritis.

117. Amy Joy Lanou, *Bone Health in Children*, U.S. NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTES OF HEALTH (Jan 26, 2020, 9:54 P.M.), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1602030/.

118. *Global Milk Consumption*, CANADIAN DAIRY INFORMATION CENTRE (Jan 26, 2020, 9:54 P.M.), http://web.archive.org/web/20170612212320/http://dairyinfo.gc.ca/index_e.php?s1=dff-fcil&s2=cons&s3=consglo&s4=tm-lt; *see also* Dinesh K. Dhanwal et al, *Epidemiology of Hip Fracture: Worldwide Geographic Variation*, U.S. NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTES OF HEALTH (Jan 26, 2020, 9:58 P.M.), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3004072/.

119. Harald Zur Hausen et al., *Dairy Cattle Serum and Milk Factors Contributing to the Risk of Rolor and Breast Cancers*, INTERNATIONAL JOURNAL OF CANCER (Jan 26, 2020, 10:04 P.M.), http://www.readcube.com/articles/10.1002/ijc.29466?r3_referer=wol&tracking_action=preview_click&show_checkout=1&purchase_referrer=onlinelibrary.wiley.com&purchase_site_license=LICENSE_DENIED_NO_CUSTOMER.

increases the risk of cancer-related hormones.[120] Dairy consumption in men results in an increase of developing prostate cancer by 34%.[121] The dairy industry, much akin to the tobacco industry, follows a similar strategy: "get them hooked young, get them hooked for life" by spending 50 million dollars a year to reach 73,000 schools through checkoff programs.[122] Perhaps the state, which purports to clarify confusion in the marketplace for plant-based foods should re-evaluate the safety of the status-quo of animal and dairy consumption.

State laws reducing plant-based food availability and consumption force consumers to eat more animal protein, which burdens the environment. The entire transportation sector produces less greenhouse gases than raising animals for food.[123] Raising animals for slaughter is also the primary cause of rainforest destruction, species extinction, ocean dead zones, and freshwater consumption.[124] The amount of resources wasted in producing animals for slaughter is also abundant – it requires 1,799 gallons of water to produce one pound of beef, and one pound of pork requires 576 gallons of water.[125] In comparison, the water footprint of soybeans is 216 gallons, and corn is 108 gallons.[126] The world's natural resources are not limitless, and the growing population of the world will only require an increase in animal agriculture to meet the demand if alternative options do not proliferate. Thus, a state law that hinders technological advancement

120. Neal D. Barnard, *Milk Consumption and Prostate Cancer*, PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE (Jan 26, 2020, 10:10 P.M.), http://web.archive.org/web/20170709004922/https:/www.pcrm.org/sites/default/files/pdfs/health/milk_and_prostate_cancer.pdf.

121. *Protect Against Prostate Cancer with a Plant-Based Diet*, PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE (Jan 26, 2020, 10:20 P.M.), https://www.pcrm.org/health-topics/prostate-cancer.

122. Kiera Butler, *The Surprising Reason Why School Cafeterias Sell Chocolate Milk*, MOTHER JONES (Jan 26, 2020, 10:14 P.M.), https://www.motherjones.com/environment/2015/11/milk-companies-market-schools-fast-food/.

123. Christopher Matthews, *Livestock a Major Threat to Environment*, FAO NEWSROOM (Jan 6, 2020, 2:08 P.M.), http://www.fao.org/Newsroom/en/news/2006/1000448/index.html.

124. Christopher Hyner, *A Leading Cause of Everything: One Industry That Is Destroying Our Planet and Our Ability to Thrive on It*, GEORGETOWN ENVTL. L. REV. (2015), https://gelr.org/2015/10/23/a-leading-cause-of-everything-one-industry-that-is-destroying-our-planet-and-our-ability-to-thrive-on-it-georgetown-environmental-law-review/.

125. Kai Olson-Sawyer, *Meat's Large Water Footprint: Why Raising Livestock and Poultry for Meat is So Resource-Intensive*, FOOD TANK: THE THINK TANK FOR FOOD (Jan. 27, 3:33 P.M.), https://foodtank.com/news/2013/12/why-meat-eats-resources/.

126. *Id.*

in protecting a state's natural resources harms public welfare and prosperity in the long run.

Plant-based food serves as an alternative protein source for persons with food sensitivities and allergies. Eliminating plant-based foods to alleviate so-called consumer confusion is a detriment to our society.

Meanwhile, proponents of the Mississippi Food Labeling Law have painted the sole benefit of providing consumers clear information on meat food products by eliminating plant-based meat replacements. Current Mississippi Commissioner of Agriculture, Andy Gipson, stated that the purpose of the labeling law is to protect confused consumers.[127] Proponents argue that requiring plant-based foods to be labeled differently will not adversely impact a company's ability to conduct new, forward-thinking research. Instead, they assert, the law seeks to offer the public "full disclosure, preserving the right of free choice and transparency in the marketplace and creating a healthier, more sustainable food industry."[128]

"That's Hog-wash" was Commissioner Gipson's response to the labeling law's opponents stating that the law is nothing more than a protectionist agenda of the Cattlemen's Association of Mississippi.[129] Economic protectionism violates the free-market approach instilled in our fundamental American roots. Lobbying the state government to protect the Cattlemen's Association is akin to assisting a pro-coal association in preventing renewable energy forms. The whole scheme is short sided for status quo profits while hindering what makes a free market great: competition. If consumers recognize the health benefits, the ethical dilemma in slaughtering animals or seek to combat climate change instead of digesting slaughtered meat, then American citizens should be able to make that determination.

Under the guise of "consumer confusion," the state should have no basis to curve a competing product instead of informing the consumers. The motto of the Mississippi's Cattlemen's Association bluntly states it "is focused on addressing local, state, and federal issues that impact the long-term viability of cattle farming in Mississippi."[130] Their motto is strictly economic and focuses on self-interest rather than the confusion, or reason constituents adopt alternatives that impact the long-term viability of cattle.

Jaime Athos, CEO of Tofurky, succinctly stated that "[t]he only confusion [] seems to be on the part of the [] legislature, which seems to

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127. Institute for Justice, *Mississippi Makes Selling 'Veggie Burgers' a Crime*, YouTube (Jan. 27, 9:00 A.M.), https://youtu.be/-sfh3wmuXTY?t=69.

128. Kimbrell, *supra* note 52, at 344.

129. Institute for Justice, *Mississippi Makes Selling 'Veggie Burgers' a Crime*, YouTube (Jan. 27, 9:00 A.M.), https://youtu.be/-sfh3wmuXTY?t=69.

130. *We Represent Mississippi's Cattlemen*, MISSISSIPPI CATTLEMEN'S ASSOCIATION (Jan. 27, 2020, 3:37 P.M.), https://www.mscattlemen.org/.

have forgotten its responsibility to its constituents in its rush to pass an unconstitutional law at the behest of its special interest donors[.]"[131] Athos further asserted that "[w]hen consumers choose plant-based foods, it is not because they are confused or misled, it is because they are savvy and educated about the health and environmental consequences of eating animal products."[132]

In sum, the states that have effectively banned plant-based food options with food labeling laws should repeal the laws. Instead of barring access to plant-based foods, states should encourage informing consumers. The federal government has expressly and implicitly preempted the states from limiting food produced from genetically engineered plants because these state laws impede the achievement of the federal government's objectives. An evaluation of the Mississippi Food Labeling Law proves it violates the Dormant Commerce Clause. Therefore, the Mississippi Food Labeling Law, and similar state statutes, must be repealed.

IV. CONCLUSION

The Dormant Commerce Clause protects individuals and companies from states enforcing laws that directly hinder commerce flow amongst the states. An examination of the Dormant Commerce Clause proves that the new food labeling laws, tracking the language of the Mississippi Food Labeling Law, are unconstitutional. The Mississippi Food Labeling Law must be abolished. It is counterintuitive and insufficient for states to balance unconstitutional food labeling laws with administrative regulations intended to blur the lines of progress, especially since the proposed legislation does not further a legitimate concern from the public. Also, peer-reviewed data supports the increasing use of plant-based foods over animal-derived food for health concerns. Therefore, a state law which promulgates a policy with externalities that harm the citizens of that respective state grossly violates public policy in exchange for antiquated business establishments. From health concerns to the impact on our global environment, the Mississippi Food Labeling Law and similarly drafted state laws provide nothing more than a guise to shield the status-quo. To protect a fundamental right, the states should abolish the laws that restrict consumer's access to plant-based food options.

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131. Brian Hauss, et al., *Tofurky Mounts Free Speech Challenge Against Arkansas Meat Label Law*, ACLU (March 1, 2020, 8:00 P.M.), https://www.aclu.org/press-releases/tofurky-mounts-free-speech-challenge-against-arkansas-meat-label-law.

132. *Id.*